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No. 07-595

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In the Supreme Court of the United States

ALAM SHER, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
WILLIAM KANTER
IRENE M. SOLET
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in determining under the particular circumstances of this case that petitioner may be fairly charged with adequate notice of his immunity under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 488 F.3d 489. The opinion of the district court (Pet. App. 50a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2007. A petition for rehearing was denied on August 3, 2007. The petition for a writ of certiorari was filed on November 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. From 1992 until 2001, petitioner was Chief Pharmacist at Togus Medical Center (the hospital), a facility operated by the Department of Veterans Affairs (VA). Pet. App. 3a. Federal regulations generally prohibit fe-

deral employees from accepting items of monetary value from anyone doing business with the employee's agency. 5 C.F.R. 2635.201-2635.203. The hospital also had a policy prohibiting employees from accepting free samples of medications from pharmaceutical company representatives, a practice called "sampling." Pet. App. 3a.

Petitioner requested free samples of the drug Lipitor from drug company sales representatives in June, August, and December 2000, and in January 2001. He received such samples on two occasions in January 2001. Pet. App. 4a. Acting on information from another employee, VA security officers stopped petitioner as he was leaving the hospital on January 29, 2001, and found 672 ten milligram Lipitor samples in his briefcase. *Id.* at 4a-5a.

The VA initiated an investigation and sought to question petitioner, who retained attorney Sumner Lipman to represent him. Pet. App. 5a. Lipman was not present at an interview with a VA investigator on February 1, 2001, in which petitioner admitted receiving free samples of Lipitor from drug company representatives. The parties dispute whether he was given notice of his rights on this occasion and whether he freely consented to the interview; according to the VA, petitioner was informed of his rights at this meeting. *Ibid.* The investigator subsequently presented the case to the United States Attorney's Office for the District of Maine, which verbally declined prosecution. *Ibid.*

The VA then notified petitioner that an additional administrative interview had been scheduled for July 10, 2001. Petitioner sought to postpone the interview because he planned to be on vacation until July 11 and because his attorney, Lipman, was unavailable until July 15. Pet. App. 6a. The VA agreed to postpone the inter-

view only until July 11. *Ibid.* Petitioner appeared at the interview, accompanied by Lipman's partner, Keith Varner. Because Varner voiced concern that the interview would expose petitioner to criminal liability, the VA obtained by fax during the interview a letter from the United States Attorney's Office stating that the Office had "declined criminal prosecution of [petitioner] in favor of administrative action." The letter also stated that the conduct for which prosecution had been considered was petitioner's "request and receipt of drug samples * * * in August of 2000 and January and February of 2001." *Id.* at 7a. Varner then consulted Lipman by telephone, and Lipman expressed concern that the letter left petitioner vulnerable to criminal prosecution. Petitioner ultimately declined to be interviewed, notwithstanding that the VA subsequently alerted Lipman to cases that explained the applicability of use immunity for government employees in petitioner's situation. *Ibid.*; *id.* at 30a-31a.

2. Upon the completion of its investigation, the VA sustained administrative charges that petitioner had solicited free Lipitor samples on five occasions between June 2000 and January 2001, had received and possessed such samples in January 2001, and had failed to cooperate in the administrative investigation in violation of VA regulations. As punishment, the agency imposed a 45-day suspension and a demotion with resulting reduction in pay. Pet. App. 7a-8a.

Petitioner appealed the agency's decision to the Merit Systems Protection Board (MSPB). An administrative law judge (ALJ) initially upheld the agency decision on the sampling charges but overturned the failure-to-cooperate finding on the ground that concerns by petitioner regarding possible criminal prosecution were legitimate.

Pet. App. 8a. The ALJ also determined that the agency's penalty was unduly severe. *Ibid.* On cross-appeals, a panel of the MSPB sustained the agency decision in all respects, concluding, *inter alia*, that the letter supplied by the United States Attorney's Office was sufficient to allay concerns about petitioner's possible future criminal liability. *Id.* at 9a-10a.

Petitioner challenged the MSPB's decision in the United States District Court for the District of Maine, which affirmed the MSPB in all respects. Pet. App. 50a-67a. Relying on the reasoning of a magistrate judge, the district court concluded that the VA had not abused its discretion in disciplining petitioner for failure to cooperate in its investigation because he had received adequate assurance that he would not be prosecuted and had full access to advice of counsel. *Id.* at 66a, 95a-99a.

3. The court of appeals affirmed. Pet. App. 1a-49a. The court focused on whether petitioner received adequate notice of his immunity from prosecution under *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). In *Garrity*, police officers under questioning in an administrative investigation were threatened that if they failed to answer, they would be subject to termination. After answering, their statements were used in a criminal prosecution against them. This Court reversed their resulting convictions, holding that the Fifth Amendment's privilege against self-incrimination barred use in subsequent criminal proceedings of statements coerced by threats of administrative disciplinary action. *Id.* at 500. Shortly thereafter, in *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968), the Court held that if a government employee refuses to answer his employer's questions about performance of his official duties *without* being required to waive his use immunity under *Garrity*, the Fifth Amend-

ment is no obstacle to disciplinary action against him. The court of appeals noted that "together, *Garrity* and *Gardner* stand for the proposition that a government employee who has been threatened with an adverse employment action by her employer for failure to answer questions put to her by her employer receives immunity from the use of her statements or their fruits in subsequent criminal proceedings, and, consequently, may be subject to such an adverse employment action for remaining silent." Pet. App. 20a.

Turning to the facts here, the court of appeals pointed to letters petitioner had received from the VA quoting regulations that require employees to testify in administrative investigations or face discipline for refusing to do so. These letters were coercive, the court concluded, and thus automatically triggered use immunity under *Garrity*. Pet. App. 22a.

Noting that "no circuit has held that an employee who is represented by counsel is entitled to notice from his employer of his *Garrity* immunity," the court of appeals found it unnecessary to decide that question because it concluded that, "[r]egardless of whether there was any [such] duty, [petitioner] may be fairly charged with such notice under the circumstances present here." Pet. App. 26a, 29a. The court explained that, with Varner present at the interview on which the charge of failure to cooperate was based and Lipman available for consultation by phone, petitioner "had access to counsel of his choice." *Id.* at 30a. Further, the court continued, the VA's letters to petitioner contained sufficient threat of removal to provide notice of *Garrity* immunity. *Ibid.* Finally, the court pointed out that counsel for the VA had referred Lipman—after the interview, but well before the agency undertook disciplinary action against

petitioner—to authorities explaining *Garrity*'s impact. *Id.* at 30a-31a.

In these circumstances, the court held, it was unnecessary to decide whether the VA had a duty to notify petitioner of his *Garrity* immunity because petitioner "may be fairly charged with adequate notice" of that immunity. Pet. App. 32a; see *id.* at 29a (Because we find that petitioner may be charged with notice "[i]n the circumstances of this case, we do not have to decide whether the VA as employer had to give [petitioner] notice of the application and consequences of his *Garrity* immunity.").

Judge Stahl, in dissent, would have answered the question that the panel majority avoided and would have recognized a government disclosure obligation. Pet. App. 39a-49a.

ARGUMENT

The question presented by the petition rests on a faulty premise: that petitioner did not receive notice of his immunity under *Garrity*. The court of appeals decided this case based on the premise that petitioner was "fairly charged with adequate notice of his immunity under *Garrity*." Pet. App. 32a. That factbound decision is correct, and it does not conflict with any decision of this Court or another court of appeals. The broader doctrinal questions raised by petitioner are not presented by this case and, in any event, do not implicate any genuine conflict of authority. Review by this Court is therefore unwarranted.

1. The court of appeals correctly concluded that, whether or not the government has a duty to notify its employees of the application of *Garrity* immunity and its consequences, the VA's decision to discipline petitioner for refusing to respond in an administrative inquiry was

consistent with the Fifth Amendment privilege against self-incrimination, because petitioner is fairly charged in the circumstances of this case with "adequate notice of his immunity under *Garrity*." Pet. App. 32a.

In so concluding, the court did not establish a broad rule that the government need not notify the employee whenever he is represented. Pet. App. 32a n.18 ("If we had concluded that a represented employee with the benefit of use immunity was automatically obliged to answer questions or face discipline, we would not have engaged in the detailed analysis of '[petitioner's] Circumstances'."). Nor did the court express any view about whether a duty to notify exists where the employee has an "objectively reasonable fear" that his statements in an administrative inquiry could be used against him in subsequent criminal proceedings. *Ibid.* (rejecting the dissent's characterization that the court's decision requires an employee to answer questions or face discipline "even where the employee has an objectively reasonable fear that his statements will not be protected by use immunity").

To the contrary, the court of appeals expressly *avoided* the broader doctrinal issues raised by petitioner and concluded that it was not necessary to reach those issues on the record in this case. Pet App. 29a. Specifically, the court pointed to these facts particular to this case: (1) petitioner had access to counsel of his choice, (2) the VA's letters to petitioner contained a clear threat of removal if he refused to answer questions in its administrative inquiry, and (3) the VA expressly alerted petitioner's counsel to cases that explained the application of *Garrity* immunity and its consequences. *Id.* at 30a-31a. Based on those facts, the court of appeals held that

petitioner could be "fairly charged with adequate notice of his immunity under *Garrity*" and, thus, any potential duty to notify him had been satisfied. *Id.* at 32a.

The First Circuit's application of an "adequate notice" standard to the facts of this case was reasonable and does not appear to differ in any meaningful way from petitioner's desired rule. Moreover, because the record supports the court of appeals' conclusion that petitioner received adequate notice, the First Circuit's factbound judgment would not be affected even if this Court adopted a categorical rule imposing a notice obligation. Indeed, although the fact is contested, the VA's position is that it specifically informed petitioner of his rights under *Garrity* at his initial February interview. Pet. App. 5a. Accordingly, this case is an unsuitable vehicle for this Court's review of the question presented —which assumes *lack* of such notice, see Pet. i—and there is no reason for this Court to grant certiorari to review the court of appeals' factbound conclusion that petitioner received adequate notice.

2. Petitioner argues (Pet. 8-14) that the courts of appeals have split on the question whether the government has an obligation to provide "actual notice" of *Garrity* immunity before it can discipline an employee for refusal to respond in an administrative inquiry focused on his official duties. Because the court of appeals decided this case based on the premise that petitioner received "adequate notice" of his *Garrity* immunity, that argument has little, if any, practical significance. In any event, examination of the decisions reveals no clear conflict among the courts of appeals on the notice question. Moreover, none of those decisions has addressed how the presence of counsel for the employee might affect the notice requirement (at least since *Garrity*, *Gardner*,

and their progeny have become established law), and thus this case does not implicate any purported conflict.

a. Petitioner cites decisions from several circuits suggesting that the government must provide its employees notice of *Garrity* immunity and its consequences before disciplining them for refusing to cooperate in an administrative investigation. Pet. 8-10 (citing decisions from the Second, Sixth, Seventh, District of Columbia, and Federal Circuits). Petitioner then cites decisions from the Fifth and Eighth Circuits that he says conflicts with the "majority" rule. Pet. 12-13 (citing *Gulden* v. *McCorkle*, 680 F.2d 1070 (5th Cir. 1982), and *Hill* v. *Johnson*, 160 F.3d 469 (8th Cir. 1998)). However, neither of those decisions creates a clear conflict.

In *Gulden*, the Fifth Circuit found no affirmative duty to "tender" *Garrity* immunity where employees had refused to appear for questioning in an administrative investigation. 680 F.2d at 1075. The court, in distinguishing some of the same circuit court cases cited by petitioner, expressly "decline[d] to answer the highly speculative question whether an affirmative grant of immunity might, *at some point*, be necessary" in the context of a "particularized, specific inquiry." *Ibid.* Therefore, the Fifth Circuit held only that no notice to employees is necessary at the very threshold of an inquiry—a conclusion with which the Seventh Circuit has expressly agreed. See *Atwell* v. *Lisle Park Dist.*, 286 F.3d 987, 991 (2002) ("we have already registered our agreement with the Fifth Circuit that there can be no duty to warn until the employee is asked specific questions"). Moreover, the court's use of "tender" is unclear; "tender" might entail something other than advising the employee of *Garrity* immunity and its consequences.

Thus, *Gulden* may have held only that the government has no duty to make an explicit grant of immunity.

Likewise, in *Hill*, the Eighth Circuit appears to address only the issue of whether the employer's "failure affirmatively to offer immunity" constituted "an impermissible attempt to compel a waiver of immunity." 160 F.3d at 471. In finding no compelled waiver, the *Hill* court did not address the scope of the employer's duty to notify an employee of *Garrity* immunity—the question presented by petitioner here. Moreover, *Hill* was decided in the qualified immunity context, such that the inquiry was simply whether the government employer violated "clearly established" law. *Id.* at 471-472. The decision thus does not reflect the Eighth Circuit's *de novo* consideration of the issue.

b. Regardless of any purported conflict among the courts of appeals based on the aforementioned decisions, such a conflict would not be implicated here because, as discussed above, the First Circuit determined that petitioner was provided adequate notice to begin with and because, as an independent factor, petitioner was represented by counsel.

With the exception of a single outdated case, none of the circuit court cases cited by petitioner addresses employees represented by counsel. Pet. App. 26a ("no circuit has held that an employee who is represented by counsel is entitled to notice from his employer of his *Garrity* immunity"). For example, the Sixth Circuit has observed that, under *Garrity*, a government employer "who compels an employee to make incriminating statements must * * * promise not to use those statements in a criminal proceeding against the employee," but has not addressed whether such an express promise is necessary when the employee is represented by counsel.

See *McKinley* v. *City of Mansfield*, 404 F.3d. 418, 439 n.24 (2005). Significantly, in considering whether the employee had been compelled to make incriminating statements, the court found it "relevant" that a representative who accompanied him at one administrative interview was "not an attorney." *Id.* at 433 n.16. Similarly, the Second Circuit has upheld the disciplining of non-cooperating employees who were provided express notice of use immunity *and* were represented by counsel, but did not address whether *both* of those conditions were necessary to its conclusion. See *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 426 F.2d 619, 627 (1970), cert. denied, 406 U.S. 961 (1972). Finally, the Seventh Circuit has expressly questioned, but did not decide, whether that circuit's rule requiring the government to warn of *Garrity* immunity "has any possible application when the employee has a lawyer." *Atwell*, 286 F.3d at 991.[1]

The lone exception comes from the Court of Claims in *Kalkines* v. *United States*, 473 F.2d 1391 (1973). In *Kalkines*, the administrative investigation of the government employee took place shortly after this Court's decision in *Garrity* and before this Court's decision in *Gardner*. The *Kalkines* court ruled that, at that stage, the impact of *Garrity* and its progeny remained uncertain even to "knowledgeable people," and notice to an employee regarding his immunity under *Garrity* was therefore necessary even though he was represented by

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[1] *Atwell*'s actual holding is that the government did not violate the Fifth Amendment by disciplining an employee who, acting on advice of counsel, refused to be interviewed in an administrative investigation. If a duty to warn a counseled employee existed at all, the *Atwell* court concluded, it arose only when the employee was asked a specific question. 286 F.3d at 991.

counsel. *Id.* at 1396. *Kalkines* provides no reliable guidance on this issue now, 40 years after the Court's well-recognized teachings in *Garrity* and *Gardner*. The Federal Circuit's subsequent decisions applying *Garrity* do not illuminate how the presence of counsel for the employee affects any government duty to provide notice of immunity.[2]

In sum, none of the circuit court decisions addressing the government's notice obligations under *Garrity* decides the impact of counsel on those obligations. Thus, none of those decisions genuinely conflicts with the First Circuit's decision that, in light of the presence of counsel and other factual circumstances, any notice obligation was satisfied here. See Pet. App. 29a, 32a.

3. Petitioner argues that the court of appeals' decision is inconsistent with decisions of this Court. That argument too is incorrect.

a. Petitioner contends that the court of appeals departed from this Court's precedents by concluding that an employee loses his right to refuse to respond in an administrative inquiry if "it can be predicted" that his answers would be protected by immunity. Pet. 15. But the court of appeals made no such holding. To the contrary, it observed (Pet. App. 21a) that *Garrity* immu-

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[2] In *Weston* v. *Department of Housing & Urban Development*, 724 F.2d 943 (Fed. Cir. 1983), the court upheld removal of an employee who was given full notice of his rights under *Garrity* and nevertheless, on advice of counsel, refused to cooperate in an internal agency investigation. In *Modrowski* v. *Department of Veterans Affairs*, 252 F.3d 1344 (Fed. Cir. 2001), the court reversed an agency's ruling that an employee had failed to cooperate in an investigation, concluding that the agency had provided the employee with ambiguous notice regarding his immunity from prosecution and had denied him an adequate opportunity to consult counsel. *Id.* at 1353-1354.

nity arises *automatically* from the threat of discipline for refusal to answer. See *Uniformed Sanitation Men Ass'n*, 426 F.2d at 626 ("the very act of * * * telling the witness that he would be subject to removal if he refused to answer was held [in *Garrity*] to have conferred such immunity"). As the court found, the relevant VA correspondence "clearly contained a threat of removal sufficient to provide notice of the application of immunity under *Garrity*." Pet. App. 30a. No speculative "prediction" about potential use of petitioner's answers in a future criminal prosecution was required.

Contrary to petitioner's suggestion (Pet. 15-16), the First Circuit's approach is not in tension with *Pillsbury Co.* v. *Conboy*, 459 U.S. 248 (1982). There, a witness who had testified before a grand jury pursuant to a grant of immunity was held in contempt by a district court in a subsequent civil proceeding when he refused to answer the same questions, or confirm his prior answers, during a deposition. In ruling that the witness could not be compelled to answer, this Court noted that even if his deposition responses were identical to those he gave before the grand jury, additional information might well be elicited in cross-examination. Further, the Court pointed out that the district court had no authority to immunize the witness for his deposition testimony because granting immunity is "peculiarly an executive" responsibility. *Id.* at 261. The *Pillsbury* Court held that, in these circumstances, the witness could not be required to rely on the district court's "predictive judgment" that a court in any future criminal prosecution he might face would be obligated to exclude the deposition testimony from evidentiary use. *Ibid.* Here, in contrast, the automatic immunity available under *Garrity* means that no such prediction by petitioner is required.

None of the other decisions of this Court cited by petitioner (Pet. 16) conflicts with the decision below either. In *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), the Court held that state contractors who were threatened with disqualification from state business for refusal to waive immunity when called to testify about their contracts were entitled to the same automatic immunity that is available under *Garrity* to state employees who are threatened with discipline. By extending *Garrity*'s automatic protection to private contractors, *Lefkowitz* casts no light on the existence or extent of any obligation to provide notice of that immunity. In *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), the Court held that a witness who is not threatened with any penalty must affirmatively assert his privilege against self-incrimination in order to claim immunity. The Court expressly distinguished *Garrity*, on the ground that it (like this case) involved a threat of punishment, which gave rise to a "self-executing privilege." *Id.* at 435. *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), held that an inmate who remained silent in a prison disciplinary proceeding could be found guilty of an infraction if other evidence supported that finding. The Court again distinguished *Garrity*, noting that the adverse consequence for the witness there resulted from his refusal to testify "standing alone and without regard to other evidence." *Id.* at 318. The Court's observations that *Garrity* therefore required immunity to be "offered" (*id.* at 316) or "grant[ed]" (*id.* at 318) by no means recognize an affirmative duty to notify the witness of the immunity automatically triggered by the government's threat of adverse action against him.

b. Contrary to petitioner's contention (Pet. 17), the decision of the court of appeals is also consistent with

the principle that the Fifth Amendment privilege against self-incrimination "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar* v. *United States*, 406 U.S. 441, 445 (1972). Relying on three aspects of the record—petitioner's access to counsel, the VA's explicit threat of discipline for refusal to answer, and the VA's provision to petitioner's counsel of authorities describing *Garrity*'s impact—the court of appeals concluded that petitioner *lacked* a reasonable basis for believing that answering would place him at risk of criminal prosecution. Pet. App. 29a-32a. Whether the court correctly evaluated that record evidence is a factbound issue not warranting this Court's review.

4. Finally, even if petitioner prevailed on the issue he presents and the failure-to-cooperate charge were dismissed, it is unclear whether there would be any practical impact on petitioner's ultimate penalty. The penalty that the VA imposed and that the MSPB upheld —suspension and demotion—is fully supported by, and well-within the range of penalties for, Sher's uncontested violation of the gift ban standing alone. See Pet. App. 124a (noting that the agency's table of penalties included removal for a first offense); *Heffron* v. *United States*, 405 F.2d 1307, 1313 (Ct. Cl. 1969) (affirming discharge of 15-year employee for accepting a case of liquor in violation of gratuity rules). This factor further counsels against this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
WILLIAM KANTER
IRENE M. SOLET
Attorneys

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